1-27-2016

State v. Harris Appellant's Brief Dckt. 43044

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 43044**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2014-3210**
v.	)	
	)	
JEROME NATHANIEL HARRIS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

_____

HONORABLE JASON D SCOTT
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Jerome Harris was charged with a single count of attempted first degree arson and a "persistent violator" sentence enhancement (*i.e.*, an enhancement for having two prior felony convictions). At the conclusion of the first phase of Mr. Harris' bifurcated trial, a jury found him guilty of the charged offense. During the second phase, the jury also found him to be a persistent violator. The district court later imposed a lengthy prison sentence (seventeen years, with five years fixed).

On appeal, Mr. Harris contends the State failed to offer sufficient evidence to support the jury's persistent violator finding and, therefore, the persistent violator enhancement must be vacated. Specifically, although the State offered substantial evidence from which a rational trier of fact could find that Mr. Harris had previously been convicted of one prior felony and two other offenses, it offered no evidence that either of those other two offenses were felonies.

Statement of the Facts and Course of Proceedings

Mr. Harris was initially charged with a single count of attempted first degree arson. (R., pp.7-8.)[1] After he waived his right to a preliminary hearing (R., p.31), he was bound over to the district court (R., pp.32-33) and an information was filed charging the same offense (R., pp.44-46.)

Months later, the State was granted leave to file an "information part II," charging

[1] The Clerk's Record consists of three electronic (.pdf) files—the Clerk's Record proper ("Harris 43044 cr"), the publicly-available exhibits to the Clerk's Record ("Harris 43044 ex"), and the confidential exhibits to the Clerk's Record ("Harris 43044 psi"). Only the former two are cited herein. They are identified as "R." and "R. Ex.," respectively.

a persistent violator sentencing enhancement under I.C. § 19-2514. (*See* R., pp.57-60 (motion); p.64 (court minutes showing State's motion was granted).) It immediately did so. (*See* R., pp.65-66.) The amended information alleged that Mr. Harris had three prior felony convictions in two different Idaho cases, and it identified those alleged felony convictions as follows:

1. Possession of a controlled substance in Ada County Case No. H0600851 (Aug. 30, 2006);
2. Trafficking in methamphetamine in Kootenai County Case No. CR-1998-5132 (Jan. 5, 1999); and
3. Delivery of methamphetamine in Kootenai County Case No. CR-1998-5132 (Jan. 5, 1999).

(R., pp.65-66.)

Ultimately, Mr. Harris exercised his constitutional right to a jury trial. (*See generally* Trial Tr.)[2] This was a bifurcated trial in accordance with well-established precedent. *See, e.g., State v. Roy*, 127 Idaho 228, 230 (1995) ("[W]here a criminal defendant is charged under the persistent violator statute (I.C. § 19–2514) . . . [t]he trial must also be bifurcated. During the first phase, the jury should be read only the first part of the information. The trial should then proceed as if there were no allegations of prior convictions. Only if the jury returns a guilty verdict on the substantive charge should the

[2] The Reporter's Transcript consists of three separately-bound transcripts. However, only two of those transcripts—the transcript of the December 15-16, 2014 jury trial and the transcript of the February 20, 2015 sentencing hearing—are cited herein. Those two transcripts are cited herein as "Trial Tr." and "Sent. Tr.," respectively.

second part of the information be read and the jury allowed to consider the recidivist charge."). At the conclusion of the first phase, the jury found Mr. Harris guilty of attempted first degree arson. (R., p.117; Trial Tr., p.284, L.9 – p.285, L.19.)

The second phase of the trial was very brief. The defense presented no evidence or arguments of any kind (*see* Trial Tr., p.289, Ls.11-13, p.290, Ls.20-22, p.291, Ls.2-3), and the only evidence presented by the State consisted of three documentary exhibits—Exhibits 25, 26, and 27 (*see* Trial Tr., p.289, L.16 – p.290, L.19).[3] Exhibit 27 is the September 5, 2006 judgment of conviction in Ada County Case No. H0600851. (R. Ex., pp.19-22.) It indicates that Mr. Harris was convicted of felony possession of a controlled substance in that case.[4] (R. Ex., pp.19-22.) Exhibits 26 and 25 are the amended information and the January 6, 1999 judgment of conviction, respectively, in Kootenai County Case No. CR-98-5132. (R. Ex., pp.13-16, 17-18.) Together, they show that Mr. Harris was charged with, and convicted of, two crimes—trafficking in methamphetamine (between 28 and 200 grams) and delivery of methamphetamine. (R. Ex., pp.13-16, 17-18.) Neither document identifies either offense as a felony. (R. Ex., pp.13-16, 17-18.) Nevertheless, in a special verdict, the jury found Mr. Harris to have been a persistent violator under section 19-2514. (R., p.118; Trial Tr., p.293, L.7 – p.294, L.11.)

[3] The State also offered a brief opening statement (*see* Trial Tr., p.288, L.15 – p.289, L.9), although it waived closing arguments (*see* Trial Tr., p.290, Ls.23-25).

[4] The judgment of conviction not only identifies Mr. Harris by name, but also lists his date of birth and social security number (*see* R. Ex., p.19), both of which a police officers had testified to (in the first phase of the trial). (*See* Trial Tr., p.144, L.16, p.146, L.4, p.167, L.25 – p.168, L.10, p.168, L.23 – p.169, L.1).

Months later, the district court imposed upon Mr. Harris a unified sentence of seventeen years, with five years fixed.[5] (R., pp.123, 125; Sent. Tr., p.21, L.18 – p.22, L.1.) A few days after that, the district court entered a written judgment of conviction. (R., pp.124-28.)

Thereafter, Mr. Harris filed a timely notice of appeal. (R., pp.131-32.) On appeal, he contends the State failed to offer sufficient evidence to support the jury's persistent violator finding because the State offered sufficient evidence as to only *one* prior felony conviction, not *two* (or more) prior felony convictions, as is required under section 19-2514. Specifically, he submits that although the State offered sufficient evidence for the jury to find that he was convicted of a felony in the 2006 Ada County case, it offered no evidence that either of the two convictions in the 1998 Kootenai County case was for a felony. Therefore, he contends the persistent violator enhancement and his sentence must be vacated, and his case must be remanded to the district court for a new sentencing hearing.

[5] Later, Mr. Harris filed a timely motion for a sentence reduction pursuant to Idaho Criminal Rule 35. (R., p.129.) Although the district court's order on that motion is not in the record on appeal (and will not be augmented into the record on appeal because Mr. Harris is not raising any sentencing-related claims on appeal), undersigned counsel submits—in case the Court is curious—that the Rule 35 motion was denied.

ISSUE

Did the State offer sufficient evidence that Mr. Harris was previously convicted of two felonies, so as to support its finding that he is a “persistent violator of law” within the meaning of I.C. § 19-2514?

ARGUMENT

Because The State Failed To Offer Substantial Evidence That Mr. Harris Was Previously Convicted Of Two Felonies, There Is Insufficient Evidence To Sustain The Jury's Finding That Mr. Harris Is A "Persistent Violator Of Law" Under I.C. § 19-2514

A. Introduction

The State charged Mr. Harris with a persistent violator enhancement pursuant to section 19-2514 of the Idaho Code. (R., pp.65-66.) Under this enhancement, he faced a minimum prison sentence of five years and a maximum sentence of life. I.C. § 19-2514.[6]

In order for the persistent violator enhancement to apply in a given case, the defendant must have been convicted of two prior *felonies*. I.C. § 19-2514.[7] It is the State's burden to prove the two prior felony convictions beyond a reasonable doubt. *State v. Schall*, 157 Idaho 488, 495 (2014).[8] Mr. Harris contends the State failed to

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[6] This represents a dramatic increase in the punishment Mr. Harris faced. In the absence of a persistent violator enhancement, Mr. Harris faced no minimum sentence and the maximum sentence he faced was twelve and one-half years. *See* I.C. §§ 18-306(2) (providing that the punishment for an attempt crime where the completed crime would have been punishable by between five years and life is one-half of the longest permissible term for the completed crime), 18-802 (providing that the punishment for the completed crime of first degree arson is "not more than twenty-five (25) years").

[7] The complete text of section 19-2514 is as follows:

> Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life.

[8] Idaho precedent is ahead of United States Supreme Court precedent on this point. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the United States Supreme Court distinguished between elements and sentencing factors, and held that a finding that the defendant is a recidivist (which fact was used to dramatically increase the maximum punishment) is the latter and, therefore, need not be treated as an element and charged in the indictment. Subsequently, however, the Supreme Court recognized that, generally, "any fact that increases the penalty for a crime beyond the prescribed

meet that burden in this case since, although it offered evidence of three prior convictions, it only offered substantial evidence to show that one of those prior convictions was a felony.

B. Standard Of Review

"A jury's finding that a defendant is a persistent violator will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of the enhancement beyond a reasonable doubt." *State v. McClain*, 154 Idaho 742, 748 (Ct. App. 2012).

C. Because The State Failed To Offer Substantial Evidence That Mr. Harris Was Previously Convicted Of Two Felonies, There Is Insufficient Evidence To Sustain The Jury's Finding That Mr. Harris Is A Persistent Violator

When it comes to proving a persistent violator enhancement under section 19-2514, "The State bears the burden of identifying the defendant as the same individual identified in the prior convictions and the burden of identifying the prior crimes as felonies." *McClain*, 154 Idaho 747. In this case, Mr. Harris concedes that the State offered sufficient evidence for a reasonable trier of fact to conclude that it met its burden

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statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In so holding, the Court carved out an exception—based on *Almendarez-Torres*—for "the fact of a prior conviction." *Apprendi*, 530 U.S. at 490, but also strongly suggested—without definitively deciding—that the *Almendarez-Torres* exception is no longer viable. It explained as follows: "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today . . . ." *Id*. at 489-90.

Mr. Harris submits that under the Fourteenth Amendment's due process clause, and consistent with the *general* standard of *Apprendi*, any fact—including the fact of a prior conviction—that increases the penalty for a crime beyond the prescribed statutory

of linking him to the prior convictions. The two judgments of conviction proffered by the State bore Mr. Harris' name, date of birth, and social security number. (*Compare* R. Ex., p.13 (first page of judgment in 1998 Kootenai County case) *and* R. Ex., p.19 (first page of judgment in 2006 Ada County case) *with* Trial Tr., p.144, L.16, p.146, L.4 (Officer Gordon testifying as to Mr. Harris' date of birth and a portion of his social security number) *and* Trial Tr., p.167, L.25 – p.168, L.10, p.168, L.23 – p.169, L.1) (Det. Thorndyke testifying as to Mr. Harris' date of birth and social security number).)

Thus, the question relevant to this appeal is whether the State offered sufficient evidence for a reasonable trier of fact to conclude that the State met its burden of identifying Mr. Harris' prior convictions as involving *felony* crimes. "The State may satisfy [this] burden by 'produc[ing] copies of judgments specifically identifying the crimes as felonies, or—if the judgments were not so specific—[by offering] admissible copies of the felony statutes applicable to the crimes recited in the judgments.'" *McClain*, 154 Idaho at 747-48 (quoting *State v. Smith*, 116 Idaho 553, 560 (Ct. App. 1989)). Here, the State failed to meet that burden with respect to two of the three alleged prior convictions.[9] Specifically, the State offered no evidence that either of the two convictions in the 1999 Kootenai County (CR-98-5132) case was for a felony.

The only evidence the State offered with regard to the 1999 Kootenai County case were Exhibits 25 and 26—the judgment of conviction and the amended

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maximum must be submitted to a jury, and proved beyond a reasonable doubt. This is apparently what the Idaho Supreme Court has already held in *Schall*.

[9] Mr. Harris concedes that the judgment of conviction for the 2006 Ada County case (H0600851) indicates that his crime of conviction—possession of a controlled substance—was a felony. (*See* R. Ex., pp.19-21.) Thus, the State offered sufficient evidence for the jury to conclude that Mr. Harris had one prior felony conviction.

information, respectively. The judgment of conviction identifies the crimes of conviction and the sentences; however, nowhere does it state those crimes are felonies under Idaho law. (*See* R. Ex., pp.13-16.) And, although the State also offered the amended information, that document likewise failed to identify the charged offenses as felonies. (*See* R. Ex., pp.17-18.) Thus, from these documents the jury had no evidence from which to conclude that the 1999 Kootenai County case resulted in felony convictions.

In such a circumstance, it was incumbent upon the State to also offer copies of the relevant statutes identifying the crimes of conviction as felonies. *McClain*, 154 Idaho at 747-48; *Smith*, 116 Idaho at 560. But it failed to do so. Accordingly, the State failed to offer substantial evidence from which a reasonable trier of fact could have found, beyond a reasonable doubt, that Mr. Harris was convicted of any felonies in the 1999 Kootenai County case. And because the Kootenai County case involved two of the three alleged prior convictions, this means the State failed to offer substantial evidence from which a reasonable trier of fact could have found, beyond a reasonable doubt, that Mr. Harris had two prior felony convictions. Accordingly, the persistent violator enhancement found by the jury is without sufficient evidentiary support and, therefore, cannot be sustained.

CONCLUSION

For the reasons set forth above, Mr. Harris respectfully requests that this Court vacate the jury's special verdict finding him to be a persistent violator, as well as his sentence, and that it remand his case to the district court for re-sentencing on the un-enhanced crime of attempted first degree arson.

DATED this 27th day of January, 2016.

_____/s/_____
ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of January, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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